IN THE

SUPREME COURT

OF THE

UNITED STATES.

OCTOBER TERM, 1934.

No. 782.

Borax Consolidated, Limited, a corporation, and Pacific Coast Borax Company, a corporation,

Petitioners,

vs.

The City of Los Angeles, a municipal corporation,

Respondent.

BRIEF IN SUPPORT OF PETITION.

Opinions Below.

The opinion of the District Court upholding petitioners' title [R. 161] is reported in 5 Fed. Supp. 281, and the opinion of the Circuit Court of Appeals reversing the decree [R. 715] is reported in 74 Fed. (2d) 901.

Jurisdiction.

The jurisdiction of this court is based upon Judicial Code Sec. 240, as amended by the Act of February 13, 1925, 43 Stats. 938; U. S. C. A. Title 28, Vol. 4, page 359, Sec. 347.

The date of the decree of the Circuit Court of Appeals, now sought to be reviewed, is January 14, 1935 [R. 733-4]. The Petition for Rehearing was filed on February 12, 1935, within the time provided by the rules of said Circuit Court of Appeals [R. 734], and denied on March 25, 1935 [R. 734].

Statement and Specifications of Error.

The essential facts of the case are fully set forth in the accompanying Petition for Certiorari and, in the interest of brevity, are not repeated here. A statement of the questions presented and the specifications of errors which will be urged is also found in the petition and, for like reason, will not be reiterated.

ARGUMENT.

I.

The Circuit Court of Appeals Erred in Rejecting the Authority of Such Cases as Knight v. United Land Association, 142 U. S. 161, and Cragin v. Powell, 128 U. S. 691, and in Holding That the Federal Patent Is Not Conclusive Evidence of the Correct Location of the Boundary Defined by Ordinary High Water Mark.

(Specifications of Errors 1 and 2.)

Vice of Assuming Premises to Be Tideland.

It is conceded that Mormon Island was in existence and a part of the public domain when the State of California was admitted to the Union on September 9, 1850, and thereby acquired title to adjoining tidelands,—a title which is on a parity with an express grant of swamp lands or other public domain. (See *Ward v. Mulford*, 32 Cal. at 372, quoted with approval by Mr. Justice Field in *Knight v. United Land Assn.*, 142 U. S. at p. 202.)

But the island was never surveyed prior to 1880 and until that time the location of ordinary high water mark, the boundary line, was indefinite and unascertained. Whether the demanded premises were on one side of the true line or on the other was essentially a *question of fact*, the solution of which depended upon proper delimitation of the boundaries of the island.

The cause cannot properly be determined upon the *assumption* that plaintiff's allegations are true; this involves a circular form of argument, which is responsible for the error into which the Circuit Court of Appeals has fallen. Its opinion shows that every contention of peti-

tioners was tested by this tacit assumption that the lands, found by the trial court never to have been tideland, were in fact of that character because so asserted by the plaintiff. The fallacy of this method of reasoning was clearly revealed by Mr. Justice Field, under exactly similar circumstances, in the *Knight* case, at pages 205-6.

Land Department a Special Tribunal With Judicial Powers.

At the time of admission of the State, the United States had already erected its own statutory tribunal, the Land Department, for the administration of its public lands, which as sovereign it might alienate in its own way and upon its own terms. Necessarily incident thereto was the determination of the facts concerning the character, quality, area and boundaries of such public land. It had committed to this special tribunal exclusive jurisdiction over these matters in such manner that its decisions had been held conclusive,—not subject to review in any other tribunal,—as to matters so committed to it, the *facts* above mentioned. This had been done prior to 1850.

Section 453, Rev. St., which is the primary source of such power in the Land Department (see *Cragin v. Powell*, 128 U. S. at pp. 697-8), originated in the Act of April 25, 1812 (2 Stats. 716, Chap. 68, Sec. 1), which was passed pursuant to Art. IV, Sec. 3, of the Constitution. "From the earliest days matters appertaining to the survey of public or private lands have devolved upon the commissioner of the General Land Office, under the supervision of the Secretary of the Interior." (*Cragin v. Powell*, at p. 697.)

As a special statutory tribunal to which has been delegated exclusive jurisdiction to determine the facts necessarily entering into the propriety of patenting public lands, the determinations of the Land Department are *judicial in their nature* and, so far as findings of *fact* are concerned, are conclusive, except upon review within the Department itself; an appeal to the Commissioner of the General Land Office and then to the Secretary of the Interior is the only prescribed avenue for reviewing such decisions; the courts have no supervisory or reviewing power in the premises. Although the jurisdiction of the Land Department is limited to "public lands", *i. e.,* those open to entry and sale, and its action with respect to lands which are not "public lands" is a nullity and subject to attack at any time or place because totally wanting in jurisdiction, the determination of *facts* such as *boundaries* pertaining to lands which are actually "public lands" involves an exercise of existing jurisdiction and *any erroneous determination presents merely the familiar case of error in the exercise of jurisdiction* and does not result in an ouster thereof.

Mormon Island being concededly public land, the Department had jurisdiction to dispose of it as such; its legal boundary was ordinary high water mark and it was necessarily a question of fact where that line lay; as an incident to selling the land, the Department had jurisdiction to inquire into and determine its character, quality, area and boundaries, and any mistake made therein would constitute error and nothing more; as no one knew the location of ordinary high water mark, the legal boundary, it was incumbent upon the Land Department to determine and delineate the same as a matter of fact and its action

thereon, in the absence of appeal to the Secretary, was conclusive, as upon any other fact.

That the decision of the Land Department, acting as such special statutory tribunal and within its jurisdiction, is *conclusive* upon all *questions of fact,* and binds the courts as well as litigants, is established by such cases as *Knight v. United Land Association,* 142 U. S. 161; *Cragin v. Powell,* 128 U. S 691; *Heath v. Wallace,* 138 U. S. 573; *Russell v. Maxwell Land Grant Co.,* 158 U. S. 253; *United States ex rel. Riverside Oil Co. v. Hitchcock,* 190 U. S. 316; and *West v. Standard Oil Co.,* 278 U. S. 200. See also *Jameson v. James,* 155 Cal. 275, 278.

When Judicial Question Is Presented.

It may be readily conceded that tidelands are not "public lands" in the sense of being subject to entry and sale, and that the Federal statutes have made no attempt to extend public grants below the ordinary high water mark. It may also be conceded that "Congress has given no authority to the Interior Department to dispose of tidelands belonging to the state or to the Nation" [R. 721]. But this does not advance us very far. We must not overlook the fact that the defining or fixing of a boundary does not effect a conveyance of land.

Muchenberger v. City of Santa Monica, 206 Cal. 635;

Russell v. Maxwell Land Grant Co., 158 U. S. 253.

The circumstances which give rise to a *judicial* question concerning boundaries after an official survey are disclosed in the *Maxwell* case (page 259) *viz.:*

> "In this connection it may be well to notice a distinction which interprets some *dicta* and decisions found in respect to the jurisdiction of courts over boundaries. *Whether a survey as originally made is correct or not is one thing, and that, as we have seen, is a matter committed exclusively to the Land Department, and over which the courts have no jurisdiction* otherwise than by original proceedings in equity. While on the other hand, where the lines run by such survey lie on the ground, and *whether any particular tract is on one side or the other of that line, are questions of fact which are always open to inquiry in the courts.* In the case before us the offer was not to show that the land in controversy was one side or other of the line established by the survey. On the contrary, it was conceded that it was within the limits of the survey, and the *offer was simply to show that that survey was inaccurate,* and that the lines should have been run elsewhere, but *this is not a matter for inquiry in this collateral way in the courts.*"

To same effect:

U. S. v. Montana etc. Co., 196 U. S. 573;
Weaver v. Howatt, 171 Cal. 302, 305.

California Acquired Title Subject to Exercise of Land Department Jurisdiction.

When the state was admitted into the Union, it took its title to public lands and, indeed, statehood itself subject to the future exercise of all paramount Federal powers, including "power to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States". (Const. Art. IV, Sec. 3.) The terms of the Admission Act (quoted at page 12 of the Petition) comprised an express reservation, on the one hand, and recognition, on the other, of the continuance of this existing paramount power (*Gibson v. Chouteau,* 13 Wall. 92; *Irvine v. Marshall,* 20 How. 558).

The *Knight* and *Cragin* cases, *supra,* specifically hold such boundary decisions to be conclusive, as does *People v. San Francisco,* 75 Cal. 394. In the *Knight* and *San Francisco* cases the controversy involved a clash between Federal and state rights concerning tideland boundary; the State of California was itself the plaintiff in the *San Francisco* case.

CORRECT INTERPRETATION OF THE KNIGHT CASE.

The Circuit Court of Appeals conceded [R. 720] that the line as established in the *Knight* case was conclusive even though erroneous and even though existing tideland was actually included within the lines of the survey. And the line there under consideration was indubitably a "meander" line. But the court held jurisdiction to be lacking, with respect to the Norway survey, for two stated reasons: (a) that the *Knight* case dealt with a grant made by Mexico prior to acquisition of the state's tideland rights

and that such Mexican grant might lawfully include tideland; and (b) that the determination of the boundary lines of the Pueblo grant involved in the *Knight* case was made by the Land Department under specific statutory authority and command.

Fact of Mexican Grant Not Determinative of Knight Case.

The first ground of differentiation overlooks the true *rationale* of the Knight decision. It may be conceded that the Mexican Government could have granted a part of its tideland to the Pueblo of San Francisco and that such a grant would have had to be confirmed and surveyed accordingly. But the decision rested on no such ground. Primarily, it involved the conclusiveness of the survey as a determination of the "ordinary high water mark" which was one of the boundaries of the grant *as confirmed.* This problem having been determined in favor of the Federal patentee, the court then considered the secondary contention that the state's title to tideland was superior to any title acquired under a Mexican grant, an argument resting upon the assumption of an actual grant of land below high water mark. The discussion was really *obiter;* for the confirmation decree extended the grant only to "ordinary high water mark" and the court had already held this line to be conclusively established before it approached the other question of relative superiority of Mexican and state tideland titles; that question had thus become academic. At least, it had no controlling influence upon the point already decided, *i. e.,* the conclusiveness of the Departmental delineation of the boundary line incorporated in the confirmation decree.

Mr. Justice Field said at page 214 of 142 U. S.:

> "No claim was ever made in the pueblo case for any part of the seashore. * * * The claim of the Pueblo was for land above the ordinary high-water mark of the bay, not for any land covered and uncovered by the tides, either daily or when they reach their highest point during the year."

He also pointed out, at pages 206-7, the origin of the phrase "above ordinary high-water mark" and the fact that its insertion in the decree was carefully made to avoid any question of the correct boundary on the bay and ocean sides.

As the law existed at that time, the court proceeding ended with the decree of confirmation. While there appears to have been an implied power in the courts to review such surveys made under the Act of 1851 "to settle private land claims", which power was expressly recognized by the Act of June 14, 1860 (12 St. at L., p. 33, Secs. 2 and 3), the legislative policy in this respect was reversed in 1864, at which time the *Act of June 14, 1860, was repealed and the court's jurisdiction pertaining to surveys expressly abrogated.* We quote *Cragin v. Powell* (128 U. S. at 697):

> "The correction of these mistakes and abuses has not been delegated to the judiciary, except as provided by the Act of June 14, 1860, 12 St. at L. 33, in relation to Mexican Land claims, which was repealed in 1864, 13 Stat. at L. 332."

It is obvious that the Knight survey, made in 1867, was not subject to court supervision and therefore stood upon an exact parity with the Norway survey of Mormon

Island. This was pointed out in *People v. San Francisco*, 75 Cal. at 397.

The chart and compass of the Land Department was the language of the court decree; it was charged solely with the duty of delimiting the "ordinary high water mark" of the "Bay of San Francisco". It had nothing to do with the extent or validity of the Mexican grant; that was determined for it by the court decree and its sole function was to mark out the lines as there described. See Knight decision, at page 170. At page 176, Mr. Justice Lamar said:

> "It is a well settled rule of law that the power to make and correct surveys of the public lands belongs exclusively to the political department of the government, and that the action of that department, within the scope of its authority, is unassailable in the courts except by a direct proceeding. Cragin v. Powell, 128 U. S. 691, 699 (32:566, 568), and cases cited. Under this rule it must be held that the action of the land department in determining that the Von Leicht survey correctly delineated the boundaries of the pueblo grant, as established by the confirmatory decree, is binding in this court, if the department had jurisdiction and power to order that survey."

And at page 182:

> "We conclude, on this branch of the case, that the Secretary of the Interior had ample power to set aside the Stratton survey and order a new survey by Von Leicht; and that his action in such matter is unassailable in the courts in a collateral proceeding. The Von Leicht survey, therefore, must be held as a correct survey of the pueblo claim as confirmed by the circuit court."

This language was used in answer to contentions of plaintiffs found at page 166, the first of which is:

> "1st. The State of California acquired her title by virtue of her sovereignty on her admission into the Union, and her title could not be overthrown by declarations of the United States made after title had vested in her."

All those contentions rested upon the *assumption* that the demanded premises constituted tideland notwithstanding the finding of the Land Department to the contrary. The arguments are essentially those made by the Circuit Court herein, previously adopted by the Supreme Court of California in its *Knight* opinion (85 Cal. 448), and necessarily rejected by the decision of Mr. Justice Lamar. Though not discussed *seriatim* or in detail, *their rejection is the inescapable conclusion from a study of the opinion.*

The Discussion of Mexican Grants.

We repeat that the crucial question in the *Knight* case was the conclusiveness of the Land Department's survey of the line of ordinary high tide,—not the effect of the grant as extending title below that line. True, Mr. Justice Lamar discussed the latter question at some length (p. 183), holding that the Mexican Government could have included tideland in its grant had it seen fit to do so. But this discussion was in answer to the secondary contention (142 U. S. p. 184) that the *court decree* did not bind the sovereign state of California as to the *title* conveyed and confirmed,—a claim that a Mexican grant of tideland was not good against the state and that the state was not bound by the court proceedings (see plaintiff's point 3rd at p. 166 and 5th (d) at p. 167 of 142 U. S.). The discussion

therefore had no bearing upon the jurisdiction of the Land Department to make its survey or the conclusiveness of the lines established by it; it went back of that to the integrity of the decree of confirmation, and hence should have no influence upon our present problem.

People v. San Francisco, 75 Cal. 388, reviews this matter of effect of Mexican grant; it being held that the state's tideland title was acquired subject to the paramount power of the Federal Government to determine title and location of such grants (p. 398). But the court had already upheld the conclusiveness of the survey (p. 397) and had done so without reference to any effect of the Mexican grant. Moreover, the ruling had been made upon demurrer and in the face of an allegation that the survey did in fact include tidelands. And the case did not involve a state's grantee; the sovereign itself was plaintiff in the action.

Bearing in mind the fact that the decree of confirmation discussed in the *Knight* and *San Francisco* cases adjudged the boundary to be ordinary high water mark, there could be no more logic in permitting a Federal survey of such Mexican grant to trespass on and divest state tideland than in sanctioning the same thing through a survey of the public domain.

Statutory Authority for Norway Survey.

The second ground of attempted distinction of the *Knight* case is that the Surveyor General was performing an express statutory duty in the first instance, and that "No authority was vested by law in the Surveyor General to determine the boundary line between the tideland belonging to the state and the upland belonging to the United

States" [R. 721] with respect to Mormon Island. With this is coupled the further statement that "Even if it be conceded that such jurisdiction existed in the Federal Government there was no attempt to exercise such jurisdiction" [R. 721].

Jurisdiction Was Actually Exercised.

First, did the Federal Government actually attempt to exercise such jurisdiction? The requirements of the Norway contract are quoted at page 6 of Petition; also the survey notes and their approval, at page 7.

The plat [R. Vol. II, p. 31], which bears the Surveyor General's approval and certifies that the "area of *public* land surveyed by Norway" is 18.88 acres, likewise shows that each station or meander corner was located at "ordinary high water mark" and that the traverses, designated as meanders, were "of the shore of Mormon Island" and "along the shore of the island".

The patent itself conveys the property as Lot One "containing eighteen acres, and eighty-eight hundredths of an acre, according to the Official Plat of the Survey of the said Lands" [R. 660]. The answer alleges [R. 48] and the reply admits [R. 113] "that the boundaries of the said Lot One, as so conveyed, were the boundaries as shown on the said plat or map and as described in the said field notes of the said Norway". This could refer to but one thing,—the traverses of the survey, the so-called "meander lines"; for there were no other boundaries shown or indicated upon or deducible from said map.

We have already quoted (Petition, pp. 15-16) other admissions to the same effect made by appellant at the trial and in its opening brief.

We submit there is no escape from the conclusion that the Land Department studiously exercised its claimed jurisdiction to fix the location of the "shore" or tide line and that it officially certified this to have been done.

Whatever may be found with respect to the "meander lines", it cannot be denied that the Land Department deliberately located, platted and certified to the existence of the corners or stations of the survey as being at the locations for which we now contend. Unless there was an absolute want of jurisdiction, there can be no avoidance of the conclusion that those stations are conclusively established at the locations indicated by Norway.

Statutory Authority More Specific Than in Knight Case.

As to the legal question of whether any "authority was vested by law in the Surveyor General to determine the boundary line between the tideland belonging to the state and the upland belonging to the United States". First, we call attention to the fact that the survey made in the *Knight* case unquestionably meandered the bay on the north and east and the ocean on the west; and it was made under a statute which was couched in general terms. That statute, 13 Stat. 332, provided, in Section 7 (p. 334):

> "That it shall be the duty of the surveyor-general of California, in making surveys of private land claims finally confirmed, to follow the decree of confirmation as closely as practicable, whenever such decree designates the specific boundaries of the claim."

No greater particularity is there found. But the statutes relating generally to surveys of public lands in California (under which the Norway survey fell) are far more ex-

plicit. The Act of March 3, 1853 (10 Stat. 244, Ch. 145), which related solely to public lands in California, provided, in Section 3 (p. 245) that the surveyor General

> "shall engage a sufficient number of skilful surveyors as his deputies, whom *he shall cause* to survey, measure, and mark base and meridian lines through such points, and perpetuated by such monuments, and such other correction parallels and meridians as may be prescribed, and also to *survey and establish the other lines of the public lands.*"

Again, in prescribing compensation, we find this language:

> "and for surveying the base and meridian lines, and private claims, and *meandering navigable waters,* the deputy surveyor shall be allowed not exceeding sixteen dollars per mile."

Clearly we have in this statute a Congressional command to the Surveyor General to *survey* and *establish all boundary lines* of public lands in California, regardless of whether the rectangular survey was wholly applicable; and that this referred to boundaries such as streams, estuaries, bays and oceans is made clear by the fixing of a stipend for "meandering navigable waters." Herein we find a distinction between the statute under which Von Leicht operated in the *Knight* case and that governing Norway. The former had only *inferential statutory authority;* he meandered the bay and ocean because that was necessary to carry out the confirmatory decree. *Norway's statutory command* (supplemented by a more specific one from the Commissioner of the General Land Office) was

to *survey* and *establish all lines*, and to do so with reference to the *"high water mark."* (See Petn. p. 6.)

The further sentence of Section 3 of the Act of 1853:

> "He shall also cause all private claims to be surveyed after they have been confirmed, so far as may be necessary to complete the surveys of the public lands,"

reflects a clear intent to place general surveys of public lands upon a plane at least as high as the surveys of confirmed Mexican grants.

The least that can be said with respect to this Statute of 1853 is that there was *not* a lack of jurisdiction to fix the meander corners of any navigable waters bounding Federal public land within the State of California.

In the nature of things no survey of Mormon Island could be made without establishing tide lines; there were no other boundaries; to deny this power is to deny any right of survey whatever.

> "It was the exclusive province of those officers to ascertain where the line of true boundary ran, subject to the control and supervision of the Interior Department. To say that those who directed and supervised the survey had not jurisdiction to perform that duty, is to deny efficacy to the laws of Congress." (Field, J., 142 U. S. 205.)

The language of the *Stoneroad* case (158 U. S. at 248, 250), is also apposite.

Express Statutory Authority Not Necessary to Land Office Jurisdiction.

But a comparison of express statutory powers should be unnecessary, for the decisions of this Court have placed surveys under the California Act to Settle Private Land Claims on an exact parity with those made under general laws.

To begin with the case of *Cragin v. Powell,* 128 U. S. 691, rested upon the general statutory provisions. The author of that opinion was Mr. Justice Lamar. The case is directly in point. It involved the settlement of the boundary line between a Federal grant of upland and a state grant of land derived from the United States apparently as swamp land; there was no express statutory authority involved. The ruling was predicated entirely upon provisions of the Revised Statutes, general in their nature, which are substantially those now found in 43 U. S. C. A. as Secs. 2; 751, par. 7; 752, par. 2; and 1201. The essence of the decision is found in this quotation from page 698 of the report:

> "That *the power to make and correct surveys of the public lands belongs to the political department of the government,* and that, whilst the lands are subject to the supervision of the General Land Office, the decisions of that bureau in all such cases, *like that of other special tribunals,* upon matters within their exclusive jurisdiction, *are unassailable by the courts,* except by a direct proceeding; *and that the latter have no concurrent or original power to make*

similar corrections, if not an elementary principle of our land law, is settled by such a mass of decisions of this court that its mere statement is sufficient."

Moreover, Mr. Justice Lamar specifically held the *Cragin* decision to be controlling in the *Knight* case; see page 176 of the report, quoted above. He did not base his decision upon any statute pertaining peculiarly to survey of private land claims; on the contrary, he relied primarily, if not exclusively, upon the general sections of the Revised Statutes, such as Sections 441, 453 and 2478 (see pp. 177, 181). He definitely held that the authority of the Department under these sections is fully as great as under any statute pertaining to the survey of private land claims. See page 181 of the report.

To the same effect, see:

Catholic Bishop of Nesqually v. Gibbon, 158 U. S. 155, 167;

Russell v. Maxwell Land Grant Co., 158 U. S. 253, 256;

Stoneroad v. Stoneroad, 158 U. S. 240.

The case of *Brown v. Parker,* 127 Mich. 390, is directly in point.

DATE OF VESTING OF TITLE TO TIDELAND IMMATERIAL.

The opinion below suggests the thought [R. 721] that the case of *Brown v. Parker, supra,* and the *Cragin* case might be differentiated upon the ground that they involved surveys made prior to the grant from the Federal Gov-

ernment to the state. This, we submit, is of no legal consequence, for the state assumes its sovereign status in subordination to all powers expressly or impliedly granted or reserved to the Federal Government. In the case of Mexican grants state title is acquired subject to performance of treaty obligations of the Federal Government or its obligation under the law of nations; in California swamp land cases (such as *Foss v. Johnstone,* 158 Cal. 119) state title is taken subject to express statutory provisions concerning the method of identification, etc.; it logically follows that tideland titles are also taken subject to the exercise of any other paramount Federal powers.

> "'In this respect *no distinction can be made between the lands acquired by her through federal grants and such as she took by virtue of her sovereignty*'." (142 U. S. 202.)

If the power to define boundaries is an incident to the exercise of the Federal Government's constitutional function concerning public land (as must be conceded), any people, upon acquiring statehood subject to that paramount power, must submit not only to the laws which Congress has already passed, but also to any future exercise thereof, such as the enactment of the Statute of 1853. In other words, a new state takes its title to tidelands subject to the express grant of power to Congress to "dispose of and make all needful rules and regulations" concerning its public lands; this means, subject to its exercise of power to survey the boundaries thereof.

It is the same type and degree of subordination which pertained to tideland adjoining the San Francisco Pueblo grant. In the one case, the prior title is vested in the Federal Government; in the other, in the grantee of Mexico. In each case the state takes subject to a prior title, which carries with it the incidental right of delimitation of boundaries through the instrumentality of the special tribunal created by the higher power, the Federal Government.

Appeal Within the Department the Only Remedy for Error.

This was clearly the *rationale* of the Cragin and Knight decisions, *supra*, and of *People v. San Francisco*, and *Foss v. Johnstone, supra*.

See, also:

Haydel v. Dufresne, 17 How. 23;

Pueblo of San Francisco, 5 L. D. 483, 494.

United States v. Coronado Beach Co., 255 U. S. 472, 488, holds that the United States itself is bound by such Land Department findings and cannot collaterally attack the same. By the same token, the state is bound.

II.

The Circuit Court of Appeals Erred in Ruling That, as Matter of Law, the Traverses of the Norway Plat Were Not Boundary Lines and That the Meander Corners Could Be Lawfully Rejected. (Specification of Error No. 3.)

The Circuit Court of Appeals said:

> "It is clear from the plat that the lines in question were meander lines, and therefore that the boundary line of the land covered by the patent is the shore line of Mormon Island and not the traverse lines of the patent" [R. 716]; and "These principles are insisted upon by the appellant and are not disputed by the appellees" [R. 718].

Question of Fact Whether Traverses Are Boundaries.

Our position on this was misunderstood. We have always contended that this is a question of fact upon which the court's finding [R. 174] is conclusive because supported by ample evidence,—indeed by explicit admissions which have been quoted in the Petition, at pages 15-16.

It is true that the lines of the plat were designated by the surveyor and the draftsman as "meander" lines; but the use of this phrase is not controlling, for, as said in *United States v. Lee Wilson & Co.*, 214 Fed. 630, 637 (affirmed in 245 U. S. 24), it is "well settled by the decisions of the Supreme Court of the United States that the making of a meander line has no certain significance". There is no "magic in a meandered line. All that can be said of it is that it is an irregular line which bounds a body of land, and beyond that boundary there may be found forest or prairie, land or water, Government or In-

dian reservation". (*Niles v. Cedar Point Club*, 175 U. S. at 308.)

Producers Oil Co. v. Hanzen, 238 U. S. 325, 339, holds it to be a question of fact whether a line designated as a meander is such in truth or is a boundary line. That case dealt with a traverse which the surveyor designated as a meander line and which throughout the opinion is referred to as "the Bristol meander line". The surrounding facts were held to prove that the line in question was actually a boundary and not a true meander.

We have at bar findings of fact on the subject, viz.:

> "* * * that the *boundaries of the said Lot One*, as so conveyed, were *the boundaries as shown on the said plat or map* and as described in the said field notes of the said survey; that *included within the said Lot One* as so conveyed by the said patent are *all of the lands described in the plaintiff's bill of complaint* herein and claimed by it to be tideland or submerged land." [R. 170; see also R. 168.]

We have mentioned (Pet. p. 15) the admissions of the pleadings concerning this matter. Any attempted proof to the contrary would have been outside the issues and necessarily disregarded. But we are not confined to the pleadings; the record is replete with more specific admissions (quoted at page 16 of the Petition). Considerable emphasis was placed upon such admissions of the parties in the *Producers Oil* case (see p. 337 of 238 U. S.).

"Meanders" Essentially Boundaries at Mormon Island.

It should be remembered that the conditions which usually dictate meanders rather than boundaries were not present on Mormon Island. In *Mitchell v. Smale,* 140 U. S. 406, 415, the court said:

> "The difficulty of following the edge or margin of such projections, and all the various sinuosities of the water line, is the very occasion and cause of running the meander line."

But in the case at bar we find no such practical difficulty; we have no tongues or projections extending beyond the general contour, no steep banks or sharp declivities, no natural obstacles to an accurate survey other or different from those found in any flat piece of land. Mormon Island, according to the opinion, "is composed of mud flats, the surface of which is in places almost horizontal" [R. 719]. It presented the simple case of running easily-defined boundaries, and was conducted in the usual manner of noting observations on the ground and interpolating in the office [R. 400]. The reason for the meander rule ceasing, so should the rule itself.

South Florida Farms Co. v. Goodno, 84 Fla. 532;
James v. Howell, 41 Ohio St. 696;
Tolleston Club v. Lindegren, 39 Ind. App. 448.

The patent is peculiarly persuasive at bar, for it conveys lot one, "containing eighteen acres, and eighty-eight hundredths of an acre, according to the Official Plat of the Survey of said Lands" [R. 660]. The phrase "according to" must refer to acreage, because the legal description

would have been complete without that plat reference; the island had been "officially designated as Lot One of Section 8 of Township 5 South, Range 13 West, San Bernardino Meridian" [R. 168]. And the mention of 18.88 acres was not *then related* to purchase price, for that had already been computed and paid [R. 657]. The only reasonable inference is that acreage was specified in the patent *ex industria* as a showing of intent to convey everything within the traverse lines.

Presumptions in Favor of Survey.

It is fundamental that, in favor of the action of the Land Department when within its jurisdiction, all things are presumed which are not affirmatively disclosed to the contrary by the face of the record. *St. Louis Smelting Co. v. Kemp,* 104 U. S. 636, 646 (per Field, J.):

> "Indeed, the doctrine as to the regularity and validity of its acts, where it has jurisdiction, goes so far that if *in any circumstances* under existing law a patent would be held valid, *it will be presumed that such circumstances existed.*"

And from this it follows that *if mean high tide line be the actual boundary,* as held at bar, *the survey, not disclosing the contrary on its face, must be held to have established and carried by spirit leveling the elevation of the mean high tide line around the island.* This contour not being a fluctuating thing and being independent of actual depressions and elevations along the shore (those conditions which make for meandering), the meander rule must cease for its basis has entirely disappeared, and the survey is thus placed on exactly the same status as the delineation of a section line across a desert terrain.

How that elevation should be determined was a matter for the surveyor and his superiors in the Department. What should be the frequency of his observations and the resulting length of his traverse lines was likewise for them, and not a court, to determine. Any corrective measure could be had only within the Department through an appropriate appeal. As we must assume that, if necessary to a lawful survey, Norway thus carried the mean high tide line around the island, it necessarily follows that his line, being as accurate as any survey of anything other than a straight line, must be held to lack all the essentials of a "meander," which places it on a parity with the Bristol meander line of the *Producers Oil Co.* case, *supra*.

Diverse Functions of Meanders.

Meander lines serve more purposes than the one mentioned in the opinion. *Wilson & Co. v. United States*, 245 U. S. 24, 29, holds it to be a proposition which is "undisputable because conclusively settled by previous decisions," that:

> "Where, in a survey of the public domain, a body of water or lake is found to exist and is meandered, the *result of such meander is to exclude the area from the survey* and to cause it, as thus separated, to become subject to the riparian rights of the respective owners abutting on the meander line in accordance with the laws of the several states."

The application of this at bar means that the meander line of the Norway survey definitely excludes everything

outside it as being not a part of the public domain and, by the same token, it should follow that the patentee should take up to the said line. The United States was bound by the survey in this regard. (See *United States v. Coronado Beach Co.*, 255 U. S. 472, 487.) Why should the state be not equally bound? In the case of *Brown v. Parker, supra*, it is said, at page 392:

> *"We recall no case, however, that holds in express terms that title does not extend to meander lines.* It has frequently been said that they have two purposes,—*one to make the boundaries of the bodies of water*, the other as a means for computing acreage; and we have in mind one case where it was held that they had the further purpose of defining the extent of ownership, where the meander was not on a body of water, but upon a marsh, partly boggy and partly dry, subject to inundation and overflow, but not permanently covered with water, and bounded along the lake by a sand beach averaging one chain in width and three feet high."

The court below cited no authorities to the effect that the grantee's title stops short of the meander line and we, like the Michigan Supreme Court, know of no such case.

San Pedro Railroad Case Distinguished.

Los Angeles v. San Pedro etc. R. R. Co., 182 Cal. 652 (Cert. denied 254 U. S. 636), is not opposed to these views, for there was involved *no attempt to reject*

any of the meander corners of the survey. Nor was there any stipulation that the lines in question were boundaries as opposed to meanders. The sole question there determined was whether the inner bay exception line of the patent to Rancho San Pedro constituted a meander line. No attack was made upon the location of the meander corners. The decision apparently proceeded upon the assumption that the meander corners were coincident with the shore line, and certainly did not rest upon any contrary contention or conclusion. See pages 654, 656, 661.

No question of right to reject survey stations was presented by the application to this court for certiorari. (See Nos. 464 and 465, this court.)

Meanders Are, at Least, Prima Facie Evidence of Shore Line Location.

The rule seems well settled that a true meander line at least establishes *prima facie* the location of the water boundary.

In re County Ditch etc., 151 Minn. 292, 295;
Illinois Steel Co. v. Budzisz, 115 Wis. 68, 80;
Bransfield v. Wallace, 195 Mich. 41, 47;
Little v. Williams, 88 Ark. 37, 46.

And, if we assume that the line in question is only *prima facie* correct, there is no possibility of overthrowing it without a review of the competency and weight of all of plaintiff's evidence. Said *prima facie* showing is

also supported by the formal admissions of the defendant, which are sufficient in themselves to sustain the finding.

We refer particularly to the license agreement of March 28, 1928 [R. 103-108] the map attached thereto [R. 108] and the subsequent license of September, 1928 [R. 60, 119]. The recitals of ownership by defendant of premises particularly described according to the Norway survey, appellant's acquiescence in that title through entry and occupation in subordination thereto, its *agreement to surrender the premises upon termination of the license*, all fortified by the delineation of the map, constitute unequivocal admissions of petitioner's title to the disputed area which are sufficient in and of themselves to support the finding against the claim of tidelands.

This license was executed by the Board of Harbor Commissioners in formal manner, that being the branch of the city government which has control of all harbor matters, including tidelands (see article XI, city charter; Cal. Stats. 1925 pp. 1024, 1071-1078), and the said board "was duly authorized to act in the premises." [R. pp. 59, 119.]

Such admissions are binding upon the City.

Chicago v. Greer, 76 U. S. 726, 733;

Los Angeles City Water Co., et al, v. City of Los Angeles, et al 88 Fed. 720, 743-4 (affirmed - 177 U. S. 558);

III.

The Court Erred in Holding That the Mean High Tide Line Is the Boundary Between Upland and Tideland.

(Specification of Error No. 4.)

This Theoretical Line Not Recognized in 1850 or 1880.

This is confessedly an average or imaginary line which is only properly ascertained as the result of observations for a period of 18.6 years [R. 732]. It is now applied 85 years after the event to the boundary of the tidelands acquired on September 9, 1850.

The established practice of the Land Department in 1880 and earlier years was shown to be the survey of "an actual mark as it appeared on the land" [R. 333]. Such contemporaneous construction of the law is "not to be overruled without cogent and persuasive reasons." (*La Roque v. United States*, 239 U. S. at 64.) And there is no reason to suppose that the method indicated in the opinion was a practical one for determining tide lines in 1850 or even in 1880. Indeed, the record shows that the necessary basic information was not then in existence (see Book of Exhibits, p. 21).

"Ordinary High Water Mark" Means a Physical Mark Upon the Ground Made by the Waters Themselves.

No cases are cited, and we know of none, previously holding that "This rule as to a definite mark is applicable to the high water line of streams but not to a boundary line of tide waters." [R. 725].

This is a Federal question and upon it the decisions of this court are uniform. None of them recognizes any

distinction in this regard between rivers and tidal waters. Moreover, the basic reasoning of the river cases is fully applicable to the ocean shore or bays or lagoons or other tidal waters. It is stated in *Houghton v. C. D. & M. R. Co.*, 47 Iowa 370, and *Carpenter v. Board of Commissioners*, 56 Minn. 513.

City and County of San Francisco v. LeRoy, 138 U. S. 656, 672:

> "The lands which passed to the State upon her admission to the Union were not those which were affected occasionally by the tide, but only those over which tide-water flowed so continuously as to prevent their use and occupation. To render lands tide-lands, which the State by virtue of her sovereignty could claim, there must have been such continuity of the flow of tide-water over them, or such regularity of the flow within every twenty-four hours, as to render them unfit for cultivation, the growth of grasses or other uses to which upland is applied."

To the same effect are *Shively v. Bowlby*, 152 U. S. 1, 58, and *Knight v. United Land Assn.*, 142 U. S. at pages 186 and 215.

So far as we can ascertain, there are no previous Federal decisions which adopt mean high tide line as the boundary in preference to the physical high water mark. The foregoing Federal authorities are controlling precedents; they have established a rule of property upon which litigants are entitled to rely and from which courts cannot lawfully depart.

THE COURT ERRED IN REJECTING NEAP TIDES AS THE CRITERION FOR ORDINARY HIGH WATER MARK.

The criterion stated by Mr. Justice Field in *Teschemacher v. Thompson*, 18 Cal. 11, 21, has been rejected largely because it is considered "merely a rough statement of a rule which must be more accurately defined in fixing a definite line of demarcation." [R. 728.]

Neap Rule Established as Common Law.

The Circuit Court says that a mere reference to the neap tides "would not establish any definite or fixed boundary" [at R. 727]. But the California Supreme Court holds contra. In *Otey v. Carmel Sanitary Dist.*, 219 Cal. 310, 313, complaint was made of a judgment quieting title to "ordinary high water mark" upon the ground that it was uncertain; concerning which the court said: "Ordinary high-water mark is the limit reached by the neap or twice-a-day tides * * * and is readily ascertainable at any given time. Under section 3538 of the Civil Code that is certain which can be made certain."

The rule stated by Judge Field is, as shown by his cited treatises, one which came to us as a part of the common law. It is not to be brushed lightly aside. *Shively v. Bowlby*, 152 U. S. 1, 14:

> "The common law of England upon this subject, *at the time of the emigration of our ancestors*, is the law of this country, except so far as it has been modified by the charters, constitutions, statutes or usages of the several colonies and states, or by the Constitution and laws of the United States."

The Teschemacher rule was sanctioned and applied by this court in *United States v. Pacheco*, 2 Wall. 587 (decided in 1865). See also:

Coburn v. San Mateo County, 75 Fed. 520, at 529.

State Neap Rule Binding on Federal Courts.

Turning to the state law we find that section 670 California Civil Code says: "The state is the owner of all land below tidewater, and below ordinary high-water mark, bordering upon tide-water within the state * * *." Section 830 C. C. provides that, in the absence of an expressed contrary intent, "the owner of the upland, when it borders on tidewater, takes to ordinary high water mark"; this section, as originally enacted in 1872, said: "When land borders upon tidewater, or upon water which constitutes an exterior boundary of the state, the owner of the upland takes to high-water mark * * *."

These statutes embody a "doctrine" which "is believed to be but a declaration of the law on this subject as it has existed since the formation of our state government" (*Wright v. Seymour,* 69 Cal. at 127). They are an unmistakable declaration of the sovereign that it claims title only as high as the "high water mark" or "ordinary high water mark". And *the decisions have uniformly defined this mark to be that delineated by the neaps.* The language of Justice Field in the *Teschemacher* case may have been *dictum,* but that is not true of the later California decisions.

Ward v. Mulford, 32 Cal. 365, 370;

People v. Morrill, 26 Cal. 336, 353;

F. A. Hihn Co. v. City of Santa Cruz, 170 Cal. 436, 442;

Eichelberger v. Mills Land etc. Co., 9 Cal. App. 628, 639;

Forgeus v. County of Santa Cruz, 24 Cal. App. 193, 194-5;

Oakland v. E. K. Wood Lumber Co., 211 Cal. 16, 23;

Otey v. Carmel Sanitary Dist., 219 Cal. 310, 313.

In those cases the question of ownership was directly presented and determined according to the location of the line of the neap tides.

The case of *Shively v. Bowlby, supra,* definitely adjudicated that the rights of the states in navigable waters extend up to ordinary high water mark; but it also recognized, as do *Barney v. Keokuk,* 94 U. S. 324, 339, and similar cases, that "If they (the respective states) choose to resign to the riparian proprietor rights which properly belong to them in their sovereign capacity, it is not for others to raise objections." Even if it could otherwise be said that the ordinary high water mark is properly defined by the mean high tide line, these California statutes and decisions could have *no less effect than a relinquishment by the state of California of all its rights above the line of the neap tides.*

In other words, if ordinary high water mark is not to be determined as a Federal question and by the physical marks on the ground, then the matter becomes one of state law and Federal courts are bound by the state rulings under the familiar doctrine pertaining to state decisions involving title to property and those construing local statutes.

Port of Seattle v. Oregon & Washington R. Co., 255 U. S. 56, 63;

Shore v. Shell Petroleum Corporation, 60 Fed. (2d) 1, 3 (10th C. C. A.);

Welch v. First Trust & Savings Bank, 15 Fed. (2d) 184, 187 (8th C. C. A.);

United States v. Title Insurance and Trust Co., 265 U. S. 472, 486.

Why Spring Tides Properly Excluded.

The authorities upon which the Teschemacher decision rests furnish a complete answer to the suggestion that "There is no inherent reason why the highest tide nearest to the full moon and new moon should be excluded from the average" [R. 728]; for those tides do not render the land uncultivable. Indeed, those tides are the ones which make swamp and overflowed lands—always recognized as belonging to the upland (see *People v. Morrill*, 26 Cal. 336, 354-6; *Irwin v. San Francisco Savings Union*, 136 U. S. 578, 580; *Miller v. Tobin*, 18 Fed. 609, 614.)

Neaps Can Be Averaged as Well as All Highs.

Even if engineering exactitude be essential in this matter, the neap tides can be averaged as easily as all the highs. They undoubtedly furnish the legal criterion heretofore established and recognized in this country, or, at least, in California. *Their mean elevation is concededly eight-tenths of a foot less than that of the mean of all the highs* [see R. 334] and the substitution of the latter standard for that heretofore adopted by the decision ... *ght switch the title to the whole of the demanded pre...s;* for the purpose of the opinion the court conceded the correctness of our statement that "the lowering or raising by one-tenth of a foot may result in the gain or loss of acres, and there are only seven acres here involved" [R. 724]. Should this result, it would mean that appellees have lost title because, without any Federal or California precedent, the Circuit Court has decided, 85 years after vesting of title, that a theoretical boundary line should control instead of the one established by decision and usage at the time of original vesting in 1850 and at the time of the survey in 1880.

San Pedro Railroad Case Not Controlling.

The San Pedro case, 182 Cal. 652, is not opposed to our position for the reason that the trial court there found as a fact the identity of ordinary high water mark and mean high tide line, which finding was not attacked by either party and formed the basis upon which the Supreme Court must necessarily assume that line to be the true boundary. The Supreme Court did not *decide* that mean high tide line is the legal boundary or that ordinary high water mark is not the line of demarcation or that it is not governed by the line of the neap tides. This is conceded at R. 724.

Attorney General v. Chambers Distinguished.

Attorney General v. Chambers, 4 DeG. M. & G. 206, 43 Eng. Reprint 486, is not a controlling authority. It was decided in 1854. Our common law on the subject was fixed at the time of independence. The *Chambers* case at best represents a later evolution of the English common law. Had ours not crystallized in a different direction, the *Chambers* decision might be persuasive; but, in view of the definite growth in this country of the doctrine that the neap tides define ordinary high water mark, the *Chambers* decision must be recognized as wholly inconsistent with that rule and can stand on no higher plane than a persuasive argument of unsoundness of the neap rule. But, as we have shown, the court was not free to depart from that rule at this late date merely because it questioned its inherent correctness.

IV.

The Circuit Court of Appeals Erred in Holding That There Is a Substantial Difference, in a Quiet Title (or Ejectment) Action, Between a Denial of Plaintiff's Title and a Counterclaim Asserting Defendants' Title, and in Holding That a Judgment for Defendant Upon That Issue Can Be Reversed Without an Examination of the Sufficiency of Plaintiff's Proofs.

(Specification of Error No. 5.)

Finding of Insufficiency of Appellant's Title Is Conclusive.

It is conceded that appellees "denied title in the City and alleged that the lands were not tide lands." [R. 715.] These denials appear at R. 34-36. The counterclaim [R. 44] alleges with somewhat greater particularity the same matters which are included in the denials of the answer. [R. 37, 41, 43.] The findings specifically relate to and pass upon "the issues raised by the complaint and denials of the answer." [R. 165.] They expressly find against plaintiff's claims of title. [R. 174-5.] The judgment dismisses the bill of complaint upon the merits and with prejudice [R. 179] and decrees that the demanded premises are not and never were tidelands. [R. 184.] These things appear in addition to the rulings with respect to the counterclaim.

The decision grants a new trial to appellant regardless of the claim that it failed to allege a cause of action or to prove the allegations made by it. In other words, it is definitely held that because of the court's view that the patent is not conclusive, the appellant is entitled to a new

trial *notwithstanding the fact that it wholly failed to prove by competent evidence that it possessed good title to the demanded premises.*

And this was done in the face of admissions of plaintiff's counsel which, in effect, rendered the counterclaim entirely unnecessary. [R. 212, 637, 689.]

Counterclaim Was Legal Equivalent of Denials.

That portion of the decree which expressly quiets defendants' title is but surplusage, for the adjudication of the insufficiency of plaintiff's title constitutes a conclusive estoppel between the parties in all future litigation. In other words, the negative and the affirmative portions of this particular judgment are, in legal effect, one and the same; they say that the plaintiff has no title.

This is the rule both in the Federal Courts and in the state of California.

Hines v. Martin, 286 Fed. 653, 656 (5th C. C. A.);

Milwaukee & Minnesota R. Co. v. Milwaukee & St. Paul R. Co., 6 Wall. 742, 747 (last paragraph of opinion);

Sunset Tel. & Tel. Co. v. City of Eureka, 122 Fed. 960 (C. C. N. D. Cal.);

Miller & Lux v. Rickey, 146 Fed. 574, 577, 579 (C. C. Nev.; affirmed in 152 Fed. 11, 17; and in 218 U. S. 258).

United Land Assn. v. Pacific Imp. Co., 139 Cal. 370, presented a conflict between a tideland deed and a title derived under the San Francisco Pueblo grant; the authority of the *Knight* case was recognized and followed. Con-

cerning the point now under consideration, the court said at page 378:

> "* * * we are yet of the opinion that in a suit to quiet title, as in other suits, *a denial of the allegations of the complaint is a sufficient answer, and a finding upon the issues thus raised, if adverse to the plaintiffs, a sufficient finding.*"

This case was affirmed in 208 U. S. 614, on the authority of the Knight and Leroy decisions, *supra*.

To the same effect, see:

Larkin v. Superior Court, 171 Cal. 719, 725;

Wilson v. Madison, 55 Cal. 5, 8;

Pennie v. Hildreth, 81 Cal. 127, 131-2;

San Jose etc. Co. v. San Jose Ranch Co., 129 Cal. 673;

Miller v. Luco, 80 Cal. 257, 261;

Booth v. Stow, 38 Cal. App. 191, 192.

Even if erroneous, a judgment based upon the counterclaim would be immaterial, because innocuous. This is held in

Warden v. Stoll, 210 Cal. 374, 376-7.

The ruling at bar is a reflection of old procedural holdings to the effect that a defendant in a Federal equity cause cannot have affirmative relief unless he pleads and proves a cross bill. But even if that rule were applicable, it could only result in the reversal of the affirmative part of the decree while leaving in full effect the negation of the plaintiff's title.

Wood v. Collins, 60 Fed. 139 (5th C. C. A.)

Rule in Ejectment Cases.

Turning to the ejectment cases, we find the rule to be the same.

Hardin v. Jordan, 140 U. S. 371, 379;

Mitchell v. Smale, 140 U. S. 406, 416 (dissenting opinion);

West v. East Coast Cedar Co., 113 Fed. 737, 740 (C. C. A. 4);

United States v. Pennsylvania & Lake Erie Dock Co., 272 Fed. 839, 842 (C. C. A. 6);

Hockett v. Alston, 110 Fed. 910 (C. C. A. 8).

Wherefore, it is respectfully submitted that a writ of certiorari should be granted herein and the cause reviewed by this Honorable Court; that thereupon the decision of the Circuit Court of Appeals for the Ninth Circuit should be reversed, and that of the District Court for the Southern District of California affirmed.

Respectfully submitted,

GURNEY E. NEWLIN,

Solicitor for Petitioners.

A. W. ASHBURN,

Of Counsel.